

**Dubrook Inc., d/b/a Dubrook Concrete and Drivers,  
Chauffeurs and Helpers Local Union #639,  
International Brotherhood of Teamsters, AFL–  
CIO. Case 5–CA–22905**

August 18, 1993

**DECISION AND ORDER**

BY CHAIRMAN STEPHENS AND MEMBERS  
DEVANEY AND RAUDABAUGH

On March 3, 1993, Administrative Law Judge Marion C. Ladwig issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel filed an answering brief and a motion to strike. Thereafter, the Respondent filed a brief in reply to the General Counsel's answering brief, an objection to the General Counsel's motion to strike, and a motion to reopen the record. The General Counsel filed a response to the Respondent's motion to reopen the record, and the Respondent filed a reply to the General Counsel's response.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,<sup>1</sup> and conclusions and to adopt his recommended Order.<sup>2</sup>

<sup>1</sup> The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf'd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In par. 3 of sec. II.A, of the judge's decision, April 29, 1992, should be substituted for July 29, 1992. We find that this inadvertent error by the judge does not affect the result here.

We agree with the judge's findings that the Respondent did not establish that it had an honest good-faith belief that Smith engaged in the picket line misconduct and that the General Counsel has shown that Smith did not do so. In these circumstances, we find it unnecessary to pass on the judge's inference that the Respondent "used Ghobashi's dubious identification as a pretext for ridding the plant of this union leader," i.e., Smith.

<sup>2</sup> The General Counsel filed a motion to strike fn. 6 of the Respondent's brief, which concerns an "Offense Report" by Officer Shann. He notes that the report was not entered into the record during the hearing and contends that it constitutes an improper attempt to supplement the record, as defined in Sec. 102.45(b) of the Board's Rules and Regulations, with materials that would have been readily available to the Respondent at the time the case was tried.

Thereafter, the Respondent filed a motion to reopen the record to admit the offense report of Officer Shann. It claims that the report has a bearing on Smith's testimony and will help the Board to make a specific finding "as to the time of the incident" involving Smith's alleged misconduct. In its motion, the Respondent states that the "Offense Report and testimony of Officer Shann had not been obtained for, nor presented at the hearing, because prior to the hearing, there was no dispute about when the incident occurred."

We deny the Respondent's motion because it has not established that the evidence is newly discovered, that it has become available only since the close of the hearing, or otherwise satisfies the requirements of Sec. 102.48(d)(1) of the Board's Rules and Regulations. In view of our denial of the Respondent's motion, we grant the General Counsel's motion to strike.

**ORDER**

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Dubrook, Inc., d/b/a Dubrook Concrete, Chantilly, Virginia, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

*Bruce E. Goodman, Esq.*, for the General Counsel.

*Michael L. Goldberg and Steve A. Mandell, Esqs.*, of McLean, Virginia, for the Respondent.

*James F. Woodward*, for the Charging Party.

**DECISION**

**STATEMENT OF THE CASE**

MARION C. LADWIG, Administrative Law Judge. This case was tried in Washington, D.C., on December 15–16, 1992.<sup>1</sup> The charge was filed August 6 and the complaint was issued November 5.

The Company on May 4 discharged and refused to reinstate driver William Smith, a member of the bargaining committee, following an economic strike. Nonstriker Emad Ghobashi had reported that he saw a picket throw a rock through his driverside truck window, shattering the glass, and had identified Smith as the person who threw the rock.

The Company contends that it has an honest, good-faith belief that Smith engaged in the picket line misconduct, even though (a) it found no rock in the truck cab, (b) the incident occurred after dark, (c) before being identified by Ghobashi, Smith informed the Company that he was not there at the time (having gone with another picket for coffee), (d) the Company failed to question Smith about his absence before deciding on May 1 to discharge him, (e) the Company revealed to the arresting police that the rock thrower was named "Buck" (the nickname of a second employee), and (f) the Company was later informed that a third employee had admitted throwing a handful of rocks that could have broken the window (a possible explanation for no rock being found in the cab).

The primary issues are (1) whether the Company, the Respondent, has established its honest belief that Smith engaged in the misconduct, (2) if so, whether the General Counsel carried his burden to establish that Smith had not, and (3) whether the discharge violated Section 8(a)(3) and (1) of the National Labor Relations Act.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Company, I make the following

**FINDINGS OF FACT**

**I. JURISDICTION**

The Company, a corporation, produces and distributes ready-mix concrete at its facility in Chantilly, Virginia, where it annually receives goods valued over \$50,000 directly from outside the State. The Company admits and I find that it is an employer engaged in commerce within the

<sup>1</sup> All dates are in 1992 unless otherwise indicated.

meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

## II. ALLEGED UNFAIR LABOR PRACTICES

### A. Discharge of William Smith

Smith drove a concrete mixer truck since 1988, except for about 2 or 2-1/2 years as dispatcher. He campaigned for the Union and served as the union observer in the July 12, 1991 election, which the Union won. The Company filed election objections and did not begin bargaining until it withdrew the objections in December 1991. Smith served on the negotiating committee until the employees struck for a contract on Monday evening, April 27. (Tr. 104, 169-171, 188.)

During the 4-day strike, as General Manager Thomas Ogorchock testified, there were typically 15 or 20 police at the picket line "Pretty much all the time." They consisted of state police and sheriff deputies from Loudoun and Fairfax counties. (Tr. 7, 155, 158.) (The map shows that Chantilly is in Fairfax County, near the Loudoun County line.)

On the evening of July 29, Smith (with picket Eddie Lopez) drove to a 7-Eleven store about 2 miles away to get coffee for the pickets. As credibly testified by Smith (who impressed me most favorably as a truthful, forthright witness), he asked the police remaining at the picket line if they would like a cup of coffee, but they declined. (Tr. 172-174, 198-199.)

After dark, while Smith and Lopez were away (for about 15 to 20 minutes) and after the remaining police had left, nonstriker Emad Ghobashi returned with his mixer truck. It is undisputed that the pickets at the cul-de-sac blocked his entrance to the plant driveway and that while he was stopped, something struck his driverside window, shattering the glass. Ghobashi then proceeded toward the plant yard and reported to Area Manager Rick Huckleby and President Paul Ogorchock. Paul Ogorchock called the police. (Tr. 13-26, 52-56, 107-114, 126-127, 174, 183, 198-199.)

Huckleby parked the truck under a light near the shop where the truck was inspected, but no rock was found. He then walked to the cul-de-sac where the strikers were picketing. On the way he saw the first police car entering the premises. (Tr. 110-113, 127, 133.)

I note that Huckleby clearly falsified his pretrial affidavit (G.C. Exh. 3), dated October 5. On page 1 Huckleby claimed that when Ghobashi drove his truck to the yard that evening, he stopped in front of Huckleby, jumped out, and "explained *how Bill Smith threw a rock* [emphasis added] into the driver's side window." On page 2 of the affidavit, Huckleby claimed that "As I approached the cul-de-sac, I saw Bill Smith and I asked him to explain what happened in order to see *what he would admit* [emphasis added]."

In fact, Ghobashi did not name Smith as the person who threw a rock and Huckleby did not ask Smith at the picket line to explain "to see what he would admit." Ghobashi, who had been employed only a month, did not know Smith's name. As Huckleby admitted at the trial, Ghobashi merely described the rock thrower as "a guy with a beard that smiles a lot," and Huckleby did not know from that description who Ghobashi was talking about. Ghobashi conceded that many of the pickets that evening were wearing beards. (Tr. 13, 32, 35-36, 109.)

As Smith credibly testified, he and Lopez returned with the coffees and two hot chocolates shortly before the first police car (followed by others) drove by the pickets into the plant premises. Smith placed one of the coffee cartons on the hood of his car and was handing out the coffee when Huckleby arrived, observing Smith with the coffee. As "everyone was just walking around getting the coffee," Huckleby asked Smith what was going on and Smith answered, "I don't know, I just got back, so what's up?" Huckleby continued asking what happened and Smith said he did not know, that *he was not there*. (Tr. 174-176, 200-207.)

Huckleby did not admit at the trial Smith's saying that he had not been there. Huckleby instead claimed that when he talked to Smith and several other pickets, "I asked them all what had happened and their response was nothing happened" (Tr. 114). I note, however, that in his affidavit, Huckleby admitted that when he asked Smith what happened, Smith "claimed he did not know what I was talking about and that he *had not been there* [emphasis added]." Some of the other pickets said "nothing happened." (G.C. Exh. 3, p. 2.) (By his demeanor on the stand, Huckleby did not impress me as being a candid witness.)

I discredit Huckleby's claim that Smith answered that "nothing happened" (which would have been an acknowledgment that Smith had been present at the picket line when Ghobashi returned). I also discredit Huckleby's claim that "Not that I can recollect" were any of the pickets drinking coffee (Tr. 122), as well as the claim by Thomas Ogorchock (who followed Huckleby to the picket line) that "I didn't notice any" strikers drinking coffee (Tr. 114, 143, 149). As indicated, Smith credibly testified that Huckleby observed him with the coffee, and "everyone was just walking around getting the coffee."

After several minutes, Sheriff Deputy Allen Shann approached in his cruiser from the plant and shone his alley light around the pickets. Ghobashi (sitting in the back seat) pointed out Smith (who wears a beard) as the rock thrower. Shann asked Smith for his identification. By that time, about seven or eight other state and county police, who had followed Shann into the plant premises, returned to the cul-de-sac. Smith recalled that he put his coffee cup down on the back of one of the police cars. (Tr. 26-37, 115, 176-177, 203, 206-207.)

Shann stated that Smith was probably going to be arrested for destruction of property. Smith said he did not understand. Shann stated the man in the car (Ghobashi) said Smith had thrown a rock and broken his window. It is undisputed, as Smith credibly testified, that he said that was untrue, "Let the man look at me in the eye and tell me he saw me throw a rock . . . I wasn't even here. . . . Let's go take a lie detector test right now." Shann refused. (Tr. 28-29, 116-117, 177-178, 203.)

Around midnight, after Shann failed to return with an arrest warrant, Smith promised another policeman that he would be there the next morning (Tr. 179-180). I infer that by the time Smith arrived Thursday morning, April 30, Sheriff Deputy Foster had already conferred with the Company. Foster had been given two employee pictures, one of a second employee and one taken of Smith when he was working as a dispatcher in the office (Tr. 181-182).

Foster arrested and handcuffed Smith and took him in the back seat of the cruiser to the police station. On the way

Foster stated, “They called you Buck.” Smith leaned toward the front seat and said, “No, I am Bill Smith.” Foster was looking down and Smith saw the two pictures that Foster had in his folder. Foster stated, “Boy, you guys do look alike, you could be brothers” and closed the folder. (Tr. 180–181.) (Foster did not testify.) Smith was charged with willful damage to the truck—based on an affidavit by Deputy Shann, who relied on Ghobashi’s identification of Smith (G.C. Exh. 4).

Thus, Smith had protested both to Huckleby and to the police that he had not been present. Yet the Company gave him no opportunity to explain his absence from the picket line before it decided on Friday, May 1, to discharge him. (On that date the Union made an unconditional offer to return to work and the strike ended. Smith had not been permanently replaced.) Thomas Ogorchock did ask Smith on Monday, May 4, if he had broken the window, but this was when the Company was discharging him, 3 days after the discharge decision was made. Huckleby did not ask Smith whether he had broken the window until July 23, after Smith had been acquitted in the criminal trial. (Tr. 7, 119–120, 162–163, 187, 210, 213, 217–219.)

It was then, as Huckleby admitted, that Smith informed Huckleby that a third employee had told Smith and his wife that that employee had thrown “a hand full of rocks and it is possible that [the third employee] could have broken the window” (Tr. 120–121). Smith credibly testified that he, his wife, and others were sitting in a restaurant when the third employee told Smith (Tr. 212):

I really feel bad for you, Bill, and I said well I feel bad for me too, I said it is just a load of bull, and he said no, he said you don’t understand, he said I feel bad for you because *I think I did it* [referring to breaking the window]. [Emphasis added.]

When later questioned by Huckleby, the third employee (who does not wear a beard) denied being the picket who broke the window (Tr. 121–122, 209).

## B. Company’s Defenses

### 1. Legal standard

Both the General Counsel and the Company cite *Rubin Bros. Footwear*, 99 NLRB 610, 611 (1952), approved in *NLRB v. Burnup & Sims*, 379 U.S. 21, 23 (1964), as applicable. Under that decision,

[T]he honest belief of an employer that striking employees have engaged in misconduct provides an adequate defense to a charge of discrimination in refusing to reinstate such employees, unless it *affirmatively* appears that such misconduct did not in fact occur . . . once such an honest belief is established, the General Counsel must go forward with evidence to prove that the employees did not, in fact, engage in such misconduct.

### 2. Honest, good-faith belief

The Company contends that its reliance on Ghobashi’s “consistent identification of Smith” warrants its honest,

good-faith belief that Smith engaged in the picket line misconduct.

Regarding his identification of Smith, Ghobashi testified at the trial (Tr. 21–23):

I am positive he is the one that threw the rock, because he is the one who stepped forward and I saw him when he threw the rock *through* the window.

Did the rock go inside the cab, or did it drop on the outside?

No, *inside*. [Emphasis added.]

He later claimed, “I believe [the rock] is big enough to fit his hand . . . it could be held in one hand” (Tr. 85).

If this testimony were true, the rock would have been in the cab. Yet, when Huckleby was asked if he looked for a rock, he admitted (Tr. 133): “I looked in the truck, there was *nothing in the truck*.” (Emphasis added.)

Apparently contending that there was enough daylight for him to be “100 percent” sure that Smith was the one who broke his window, Ghobashi claimed that it had “*started* [emphasis added] getting dark” (Tr. 29, 37). To the contrary, in the July 23 criminal trial, both Ghobashi and Huckleby testified that it was dark (G.C. Exh. 2, pp. 17, 28). Also, Thomas Ogorchock admitted that it was dark (Tr. 165).

Apart from the asserted identification of Smith, I discredit Ghobashi’s claims that it had just started getting dark and that he saw a rock being thrown through the window into the cab.

The Company in its brief ignores Huckleby’s admission in his pretrial affidavit that Smith stated he “had not been there.” It instead (at 11) relies on Huckleby’s discredited testimony that Smith said that “nothing happened”—falsely implying that Smith acknowledged being present at the picket line when Ghobashi returned.

The Company argues (Br. at 12) that it reasonably became “convinced that Smith was indeed the perpetrator of the rock throwing incident,” pointing out that Huckleby spoke to Ghobashi that evening about his identification of Smith, that both Huckleby and Thomas Ogorchock spoke to Ghobashi the next day (evidently in the meeting with Sheriff Deputy Foster), and that “Ghobashi remained positive in his identification of William Smith” (Tr. 118–120).

In making this argument, the Company ignores the evidence that Sheriff Deputy Foster was informed, obviously by the Company, that the rock thrower was nicknamed “Buck” and that Foster was given the two pictures, one of the second employee and one of Smith. I find that this undisputed evidence indicates that the Company and Ghobashi—contrary to their denials—had misgivings about the identification of Smith as the person who broke the window in Ghobashi’s truck.

I reject the Company’s contention in its brief (at 15) that it “met its burden of demonstrating that when it declined to reinstate William Smith, it did so in an honestly held, good faith belief that Smith had engaged in picket line misconduct which was unprotected by the Act.”

To the contrary, I find that the Company evidently doubts both Ghobashi’s identification of Smith as “Buck” and his veracity when he claimed that he saw a rock go through the truck window—when no rock could be found in the cab. It failed to investigate Smith’s insistence that he had not been

there, even though Huckleby observed Smith handing out coffee from the carton on the hood of his car, suggesting that Smith had in fact been away from the picket line, getting coffee for the pickets.

I infer that the Company used Ghobashi's dubious identification as a pretext for ridding the plant of this union leader, who had successfully campaigned for the Union, had served as the Union's election observer, and had been serving on the negotiating committee that had been unsuccessful in reaching a collective-bargaining agreement with the Company.

### 3. No affirmative proof

The Company contends in its brief (at 15) that "Having demonstrated at the hearing that [it] had an honest and good faith belief that Smith had engaged in the misconduct—throwing a rock through Ghobashi's truck window—it became the General Counsel's duty to demonstrate 'affirmatively . . . that such misconduct did not occur.'" The Company further contends (Br. at 16) that the General Counsel did not "offer any evidence which would show 'affirmatively' who aside from William Smith, did throw the rock through Ghobashi's window."

To the contrary, I have found that the Company has not demonstrated that it had such an honest, good-faith belief. I therefore find that the General Counsel did not have the burden of affirmatively proving that Smith did not engage in the misconduct. Furthermore, the General Counsel had no burden of proving "who aside from William Smith" engaged in the misconduct. That was not in issue.

Moreover, I find that the credible evidence clearly shows that Smith did not break the window because he was not present at the time. He was on a "coffee run" to get coffee for the pickets.

I reject the Company's challenges to Smith's credibility. By his demeanor on the stand, Smith impressed me most favorably as a truthful, forthright witness.

In challenging Smith's testimony that he asked the police if they wanted coffee when he and Lopez left the picket line to get coffee, the Company relies on Huckleby's testimony ("I recollect" that the Loudoun County police were there "up to about 7 o'clock") and Thomas Ogorchock's testimony ("That is my best recollection" that the Loudoun County sheriff's department left at 6:30).

Even if this testimony by Huckleby and Thomas Ogorchock were credited, despite their discredited denials that they saw coffee at the picket line that evening, it would not establish that police from the other two jurisdictions (the state police and the Fairfax County police) did not remain. As indicated above, Thomas Ogorchock admitted that the typically 15 or 20 police at the picket line included state police and sheriff deputies from Loudoun and Fairfax Counties.

I find that even if the Company did establish that it held an honest belief that Smith had engaged in the misconduct, the General Counsel has affirmatively proved that he did not do so.

I therefore find that by discharging and refusing to reinstate Smith on May 4, the Company discriminated against him in violation of Section 8(a)(3) and (1).

### CONCLUSION OF LAW

By discriminatorily discharging and refusing to reinstate William Smith on May 4, 1992, the Company engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(3) and (1) and Section 2(6) and (7) of the Act.

### REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having discriminatorily discharged and refused to reinstate an employee, it must offer him reinstatement and make him whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>2</sup>

### ORDER

The Respondent, Dubrook, Inc., d/b/a Dubrook Concrete, Chantilly, Virginia, its officers, agents, successors, and assigns, shall

#### 1. Cease and desist from

(a) Discharging, refusing to reinstate, or otherwise discriminating against any employee for supporting Drivers, Chauffeurs and Helpers Local Union #639, International Brotherhood of Teamsters, AFL-CIO or any other union.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

#### 2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer William Smith immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed, and make him whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, in the manner set forth in the remedy section of the decision.

(b) Remove from its files any reference to the unlawful discharge and notify the employee in writing that this has been done and that the discharge will not be used against him in any way.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

<sup>2</sup>If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(d) Post at its facility in Chantilly, Virginia, copies of the attached notice marked "Appendix."<sup>3</sup> Copies of the notice, on forms provided by the Regional Director for Region 5, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

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<sup>3</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

#### APPENDIX

NOTICE TO EMPLOYEES  
POSTED BY ORDER OF THE  
NATIONAL LABOR RELATIONS BOARD  
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT discharge, refuse to reinstate, or otherwise discriminate against any of you for supporting Drivers, Chauffeurs and Helpers Local Union #639, International Brotherhood of Teamsters, AFL-CIO or any other union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer William Smith immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed and WE WILL make him whole for any loss of earnings and other benefits resulting from his discharge, less any net interim earnings, plus interest.

WE WILL notify him that we have removed from our files any reference to his discharge and that the discharge will not be used against him in any way.

DUBROOK INC., D/B/A DUBROOK CONCRETE